PEAN KAR FU

v.

MALAYAN BANKING BHD;
TOH BOON PIN (INTERVENER)

HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[ORIGINATING SUMMONS NO: 24(L) 772-2002]
2 SEPTEMBER 2003

CIVIL PROCEDURE: *Discovery - Banker's books - Banker's Evidence Act 1949, s. 7 - Whether confers a right to bring a separate action against bank to reveal book entries - Whether prescribes alternative method of discovery*

CIVIL PROCEDURE: *Discovery - Banker's books - Application for discovery under Banker's Evidence Act 1949, s. 7 - Whether application should be made to trial court*

EVIDENCE: *Banker's books - Discovery - Application for - Whether ought to be made before trial court - Banker's Evidence Act 1949, s. 7*

The plaintiff had filed a petition under s. 181 of the Companies Act against a customer of the defendant. The petition was filed in the High Court at Johore Baru. The plaintiff *inter alia* applied to the defendant for copies of cheques drawn on its customer's account. The official assignee consented to the release of such copies by the defendant to the plaintiff. The defendant however only released copies of 17 cheques to the plaintiff. The defendant refused to release copies of other cheques to the plaintiff. The plaintiff thereafter applied to the High Court at Muar for *inter alia* an order compelling the defendant to furnish the plaintiff with copies of all cheques drawn on its customer's account. In the High Court, arguments centred mainly on the scope and effect of s. 7 of the Banker's Evidence Act 1949 ('the Act').

Held (dismissing the application with costs):

[1] Section 7 of the Act is to enable parties, who would not otherwise be able to do so, to inspect the books of the bank and to take copies of them. Section 7 of the Act empowers the court to order the inspection and the taking of copies of entries in a banker's book in the pre-trial discovery process. (p 525 g-h)

[2] Section 7 of the Act does not however confer a right to bring a separate action against a bank to reveal its book entries, or to take the discovery process away from the court before whom the legal proceeding is being held or taken. Section 7 of the Act does not provide an alternative method of discovery which remains in the domain of the trial court. On the facts, the application for a s. 7 order should have been made to the trial court. (p 526 a-b)

Case(s) referred to:

Al-ANi v. Shubber (unreported)

Chan Swee Leng v. Hongkong and Shanghai Banking Corp Ltd [1996] 1 CLJ 812 HC ***(refd)***

Goh Hooi Yin v. Lim Teong Ghee & Ors [1977] 2 MLJ 26 ***(refd)***

Norwich Pharmacal Co & Ors v. Commissioners of Customs and Excise [1973] 2 All ER 943 ***(refd)***

Perwira Habib Bank Malaysia Bhd v. Dipri Trading Sdn Bhd & Ors [1994] 2 CLJ 83 HC ***(refd)***

Williams v. Williams [1987] 3 All ER 257 ***(refd)***

Legislation referred to:

Bankers Evidence Act 1949, ss. 2, 7(1), 8

Banking and Financial Institutions Act 1989, ss. 99

Bankers' Book Evidence Act 1879, ss. 7, 9(2) [UK]

For the plaintiff - Mogan Karupiah
For the defendant - Shahareen Begum; M/s TK Lim & Co
For the intervener - Julie Lim; M/s Julie Lim, Vasanthan & Co

Reported by AC Simon

JUDGMENT

Jeffrey Tan J:

This is an application by the plaintiff for the following orders:

(1) Defendan diperintahkan membekalkan kepada Plaintif dan atau peguam Plaintif dan atau ejen Plaintif dan atau wakil Plaintif, "cheque image" dan atau sesalinan fotostat kesemua cek-cek (depan dan belakang) yang telah dikeluarkan oleh Syarikat T&Y Treasures Time Sdn Bhd dibawah akaun No. 001039122818, dengan Defendan, seperti yang disenaraikan di dalam Jadual dibawah Saman Pemula disini;

(2) Defendan diperintahkan membekalkan "cheque image" dan atau sesalinan fotostat cek-cek yang disenaraikan di Jadual tersebut, kepada Plaintif atau peguam Plaintif atau ejen atau wakil Plaintif dalam masa tujuh (7) hari selepas disampaikan dengan perintah Mahkamah yang akan dibuat disini;

(3) Perbelanjaan "cheque image" dan atau fotostat cek-cek tersebut dan pembekalannya kepada Plaintif atau peguamcaranya atau ejennya atau wakilnya, ditanggung oleh Defendan;

(4) Kos permohonan ini dibayar oleh Defendan kepada Plaintif serta merta;

(5) Lain-lain perintah yang difikirkan suai dan manfaat oleh Mahkamah Yang Mulia ini.

In relation to the background facts, and the following is not in dispute, Mr. Mogan Karupiah for the plaintiff related that (a) the entire issued share capital of T & Y Treasures Time Sdn. Bhd. (T & Y) are held by members of the Yong Family and Toh Family, (b) the plaintiff and her husband are members of the Yong Family and they jointly hold 30,000 ordinary shares of RM1 each out of the total issue share capital of RM100,000, (c) sometime in May 2001 (it was on 4 April 2001) the Yong Family filed a petition (Johore Baru High Court 26-2-2001) (petition) against Toh Boon Pin, Toh Boon Teh, and T & Y, for relief under s. 181 of the Companies Act, and on 2 May 2001 the High Court at Johore Baru appointed one Koh Kheng Min as interim Receiver & Manager of T & Y, (d) on 16 February 2001 and with the consent of the parties, the High Court at Johore Baru appointed the official receiver as the interim Receiver & Manager of T & Y, (e) the aforesaid consent order dated 16 May 2001 is still valid and binding on the parties, (f) T & Y maintained a banking account (number 001-039-122-818) with the defendant, (g) the plaintiff applied to the defendant for copies of cheques drawn on the said account, (h) on 4 March 2002, the official assignee gave his consent to the defendant to release copies of the said cheques to the plaintiff, (i) on 10 May 2002, the defendant released copies of 17 but not the other cheques despite the several requests of the plaintiff.

In relation to the applicable law, Mr Karupiah submitted that under s. 7(1) of the Bankers Evidence Act 1949 (Act) a judge may order the inspection of a banker's book, and that under s. 8 of the same Act a judge may order the bank to pay the costs of a s. 7 application. Counsel drew the attention of the court to s. 99 of the Banking and Financial Institutions Act 1989, and said that secrecy was not a sufficient reason to withhold copies of the said cheques from the plaintiff, as the official assignee had given permission for the release of the same. Counsel then referred to *Perwira Habib Bank Malaysia Berhad v. Dipri Trading Sdn Bhd & 3 Ors* [1994] 2 CLJ 83 and *Chan Swee Leng v. Hongkong and Shanghai Banking Corp Ltd* [1996] 1 CLJ 812, but said that it was held in *Norwich Pharmacal Co and Ors v. Commissioners of Customs and Excise* [1973] 2 All ER 943 that the person against whom discovery is sought is under a duty to assist the person who has been wronged by giving him full information.

Miss Shahareen Begum for the defendant was quick to answer that cheques are not bankers' books within the definition of s. 2 of the Act. Counsel referred to *Williams v. Williams* [1987] 3 All ER 257, 261, where it was indeed held by the English Court of Appeal per Sir Donaldson MR that paid cheques and pay-in slips retained by a bank after the conclusion of a banking transaction to which they relate are not 'bankers' books' within the definition of s. 9(2) (which is in *pari materia* with s. 2 of the Act) of the Bankers' Book Evidence Act 1879 and accordingly cannot be the subject of an order for inspection pursuant to s. 7 (which is in *pari materia* with s. 7 of the Act) of the 1879 Act. Counsel argued, that the court hearing the petition should make any order under s. 7, and that the jurisdiction to make such order lies with that court and not this court. *Norwich* must be distinguished, she said. "This is not any discovery to identity wrongdoers." Copies of the said cheques could be obtained in the petition proceedings, and through the Receiver & Manager who should make the application himself and not delegate the task to the plaintiff. Counsel said that the defendant had mistakenly released copies of 17 cheques to the plaintiff. Miss Julie Lim for the intervener expressed a similar view that s. 7 of the Act is not any provision providing for an independent course of action. Mr Morgan made no further legal submission, but said that T & Y was paralysed by the appointment of the Receiver & Manager who had not done anything to assist the petitioner.

Rightly so, there was no disagreement on the power of the court to order the inspection and or the taking of copies of entries in a bankers' book. That power is clearly found in s. 7 of the Act, which reads as follows:

(1) On the application of any party to a legal proceeding the court of judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings.

(2) An order under this section may be made either on or without summoning the bank or any other party, and shall be served on the bank three days before the same is to be obeyed unless the court or judge otherwise directs.

And that power was exercised in *Perwira Habib Bank Malaysia Bhd v. Dipri Trading Sdn Bhd & 3 Ors*, where it was held by Abdul Malek Ahmad J, as he then was, that an application under s. 7 can be made for trial purposes as well as for interlocutory matters (see *Al-Ani v. Shubber*, 27 May 1999, Court of Appeal (Civil Division) where the order for the production of the banker's books was made in aid of the freezing order – an order requiring the defendant to make full disclosure of his assets), and that it was "necessary for the inspection ... to be done for the further conduct of these proceedings".

That power was not exercised in *Chan Swee Leng v. Hongkong and Shanghai Banking Corp Ltd*, where it was held by the registrar that for a s. 7 order to be made there must be a separate legal proceeding in existence. Dismissing the appeal, Roberts CJ (Brunei) enunciated:

> The Act, which is based on the UK Bankers' Books (Evidence) Act, is designed for the protection of bankers. Its main purpose is to enable copies of entries in bankers' books to be received as *prima facie* evidence of that entry.
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> Section 6 of the Act, indeed, provides that an officer of the bank shall not, in any legal proceedings to which the bank is not a party be compellable to produce any bankers' books if the contents of these can be proved under the Act.
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> ...
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> The phrase 'legal proceeding' is used in s. 7 of the Act. Before a court has power to order the inspection and taking of copies of any entries in a banker's book, there must be an application by a 'party to a legal proceeding'.
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> The plaintiff is, in a sense, a party to legal proceedings. These are defined in the Act, as meaning any civil or criminal proceeding or enquiry in which evidence is, or may be, given and includes an arbitration. I have no doubt that the wide terms of this definition will include an originating summons or motion taken out under the Brunei Rules of the High Court 1990 ('the BRHC') or otherwise.
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> The plaintiff, however, is seeking to use against the bank, an Act which was passed for the benefit of banks to enable them to produce copies of the entries in their books, instead of the books themselves, in order to avoid the disruption of the bank which would result if the original books had to be taken to court.
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> It is clear from *Williams v. Summerfield* [1972] 2 QB 512, that, as Lord Widgery LCJ said, at p. 518:
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> > The effect of the judgment in *Bono*'s case (R v. Bono [1913] 29 TLR 635) and other authorities is that the courts have set their face against s. 7 being used as a kind of searching inquiry or fishing expedition beyond the ordinary rules of discovery.
> >
> > In civil proceedings the normal approach to the use of s. 7 is that documents which would be discoverable, under the ordinary rules applicable thereto, are not to be disclosed by a side wind, as it were, by the application of s. 7.

> Lord Widgery further deprecated (in relation to criminal proceedings) the use of an application under s. 7 as a fishing expedition in the hope of finding some material upon which a charge could be hung. The same principle will, in my judgment, apply to civil proceedings as well.
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> Although s. 7 of the Act is not in terms restricted to other legal proceedings, I have no doubt that this is the object of the Act. It is to enable parties, who would otherwise not be able to do so, to inspect the books of the bank and take copies of them.
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> The Act is not intended to provide an alternative method of discovery for a litigant who seeks to bring legal proceedings against the bank itself.
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> Where the bank is itself a defendant, there is provision for an order for discovery to be made under the BHCR. Section 7 is not to be used to enable any party to those proceedings to inspect the defendant's books, in order to provide evidence such as will justify proceeding against the bank.
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> In summary, the applicant, before an order is made in his favour under s. 7 of the Act for the inspection of a ledger kept by the bank, must first show that he is a party to separate legal proceedings.

The application in *Chan Swee Leng v. Hongkong and Shanghai Banking Corp Ltd*, failed basically because the plaintiff was not a party to a legal proceeding. It failed also because it was held that the Act is not intended to provide an alternative method of discovery. That the Act is not so intended was also observed in *Goh Hooi Yin v. Lim Teong Ghee & Ors* [1977] 2 MLJ 26, where Arulanandom J said:

> The main object of the provisions of the Act is to enable evidence to be procured and given and to relieve bankers from the necessity of attending and producing their books. They do not give any new power of discovery or alter the principles of law or the practice with regard to discovery.

It should be pointed out that the said applications in *Chan Swee Leng v. Hongkong and Shanghai Banking Corp Ltd* and *Goh Hooi Yin v. Lim Teong Ghee & Ors*, were made to the court before whom the legal proceeding was being held or taken. Those applications were not taken to another court. But in the instant case, application was made to a court, to this court, which has no jurisdiction whatsoever over the said petition. As said, s. 7 is to enable parties, who would otherwise not be able to do so, to inspect the books of the bank and take copies of them. Section 7 is to assist discovery. Section 7 has not altered the principles of law or practice with regard to discovery which is the pre-trial device to obtain facts and information about the case from the other party in order to assist the party's preparation for trial. Section 7 empowers the court to order the inspection and the taking of copies of entries

in a banker's book, in the pre-trial discovery process. But that is not to say that s. 7 has brought about a right to bring a separate action against a bank to reveal its book entries, and or to take the discovery process away from the court before whom the legal proceeding is being held or taken. Section 7 has not provided an alternative method of discovery. Discovery remains in the domain of the trial court. This application for a s. 7 order should have been made to the trial court. After all, it is the court presiding over the legal proceeding that is in the best position to determine the issues and or questions in the cause or matter, and in the best position to rule on the orders in relation to discovery. For these reasons, this application is dismissed with costs.